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Nos. 97-762, 97-770

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

STAR ENTERPRISE,

*Petitioner,*

-and-

TEXACO, INC.,

*Petitioner,*

*vs.*

MATTHEWS SMITH, *et al.*,

*Respondents.*

*On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether federal courts have the power to issue property-freeze injunctions when the affected property consists of documents and electronically stored information containing evidence relevant to a pending civil action. (Texaco, Inc.'s Question).

Whether an injunction or document preservation order constitutes a prior restraint on free speech in violation of the First Amendment. (Star Enterprise's Question 1).

Whether a district court is authorized to use a document preservation order to affect future communications. (Star Enterprise's Question 2).

Whether the district court erred in granting an overly broad preliminary injunction and then reissued it in modified form despite Smith's failure to meet the requirements for an injunction. (Star Enterprise's Question 3).

## PARTIES TO THE PROCEEDINGS

The petitions accurately list the parties to the proceedings

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The Respondents, Matthews Smith, *et al.* ("Smith"), respectfully file this combined brief in opposition to the petitions of Texaco, Inc. ("Texaco") and Star Enterprise ("Star").

## STATEMENT OF THE CASE

This is a race discrimination case originally filed by Matthews Smith against Star and Texaco. The primary issue on appeal is whether a federal district court has the authority to require a party refrain from destroying evidence.

Matthews Smith went to work for Texaco in 1980. (2 R. 6). In 1989, Star was formed as a joint venture of an indirect subsidiary of Texaco and Saudi Refining, Inc. Smith went to work for Star at that time. Although Star and Texaco are nominally separate entities, they maintain a close working relationship, and Star employees have always considered themselves to be Texaco employees. (2 R. 12, 46-47, 58, 72, 75, 97). In particular, Star and Texaco share an employee assessment and advancement system that has been the subject of race discrimination litigation for several years.

In 1994, Smith contacted lawyers pursuing an employment discrimination class against Texaco. (2 R. 11). Because of the close relationship between Star and Texaco, Smith expected to be included in that action (2 R. 11-12), but a few days before that case settled, Smith was informed that Star employees had been excluded from the class. (2 R. 9). Shortly thereafter, Smith learned Texaco was removing documents from Star's premises. (2 R. 16). At that point, based on the widely publicized allegations that high-ranking Texaco executives had discussed destroying evidence in the other action, Smith sought to prevent any such document destruction at Star. (2 R. 16-17).

Smith sought and obtained a state court temporary

restraining order (TRO)[1] prohibiting the destruction, alteration, or transportation of documents relevant to his racial discrimination claims. After Smith obtained the state court TRO, he learned that Texaco employees, without interference from the Star manager, were still loading documents into trucks in violation of the TRO.[2] (2 R. 23).

Star then removed Smith's action to federal court, alleging federal question jurisdiction under 28 U.S.C. § 1331 based on a theory that the state court petition raises federal questions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981. (1 R. 1-3). Smith filed a motion to remand, alleging that his state court petition did not state a federal claim. The district court ultimately determined that Smith's petition stated a claim under § 1981 and denied the motion. *Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Texaco filed a motion to dissolve the state court TRO. (1 R. 80-86). The next day, the district court entered an order modifying the TRO, requiring Smith to post bond and setting a date for a preliminary injunction hearing. The court held a

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1. Smith obtained the TRO in anticipation of a lawsuit to be filed after he had exhausted his administrative remedies under the Texas Commission on Human Rights Act and Title VII. Smith originally sought injunctive relief rather than a document preservation order because he regarded the race discrimination lawsuit as premature.

2. Star allowed Texaco employees to move documents in violation of a court order. (2 R. 23). Petitioners have not claimed that it was permissible to move the documents because they do not relate to Smith's discrimination charges. Rather, the Petitioners admitted that they did not know exactly what was in the boxes they were moving, and Star's human resources director conceded that there were probably records in the old records room that the Plaintiffs should review. (2 R. 102).

hearing, and, finding that the prerequisites for an injunction had been met, issued a memorandum opinion and order granting the preliminary injunction. (1 R. 169-182). Star and Texaco filed notices of appeal. (1 R. 208-209, 210-11).

Both Texaco and Star filed motions to stay the preliminary injunction in the district court, which were denied (1 R. 186-196, 199-207, 238-41), and then in the Fifth Circuit. Smith and others then filed Plaintiffs' First Amended Complaint, formally alleging various violations of 42 U.S.C. § 1981, and seeking class certification. (1 Supp. R. 21-36). Smith then requested document preservation orders as recommended in the *Manual for Complex Litigation*. (1 Supp. R. 37-40). Shortly thereafter, the Fifth Circuit entered an order granting Appellants' motions to stay the preliminary injunction without prejudice to any discovery order that the district court might enter.

After holding a hearing (2 Supp. R.), the district court entered three document preservation orders. (1 Supp. R. 129-38). Star and Texaco appealed the document preservation orders, (1 Supp. R. 158-74, 201), and filed motions to stay, which the Fifth Circuit denied.

The Fifth Circuit heard oral argument and ruled from the bench, affirming without opinion. Star filed a motion for panel rehearing and Texaco filed a suggestion for rehearing *en banc*, both of which were denied.

## REASONS FOR DENYING THE WRIT

### I.

### THERE IS NO REASON TO GRANT THE PETITIONS.

The district court's order was affirmed without opinion, which means that the court of appeals determined that an opinion would have no precedential value. 5th Cir. R. 47.6. Moreover, the "opinion" was unpublished, and carries no precedential value in unrelated cases. 5th Cir. R. 47.5.5. A nonopinion with no precedential value could be wrongly decided, but it cannot create a conflict among the circuits, or with Supreme Court precedent. Moreover, even if the Fifth Circuit had set out its reasons for ruling as it did, there would still be no conflict because no federal appellate court has ever endorsed the positions taken by the Petitioners in this case. The district court correctly applied the law, and the Fifth Circuit correctly affirmed.

In addition, most of the arguments put forth by the Petitioners were not timely raised. Absent manifest injustice, the Fifth Circuit does not consider arguments belatedly raised after appellees have filed their brief. *Najarro v. First Fed. Sav. & Loan*, 918 F.2d 513, 516 (5th Cir. 1990). The general rule in the Fifth Circuit is that if an argument is not raised in a party's principal brief, it is waived. *E.g., id.*; *Stephens v. C.I.T. Group/ Equip. Fin., Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991).

In its principal brief, Texaco argued that the prerequisites for an injunction had not been met. Texaco went on to argue that a document preservation order is really an injunction, and that the district court lacked authority to enter a document preservation order without complying with Rule 65 and other

requirements for an injunction. Texaco did not challenge the district court's authority to prohibit by injunction the destruction of documents on a proper showing. Although Texaco discussed the inherent powers of federal courts and the limits of equity, it did so only in the context of a document preservation order entered in the absence of the evidentiary showing required for an injunction or without complying with Rule 65. Texaco's contention that federal courts lack the authority to issue property freeze injunctions did not appear in writing until Texaco filed its suggestion for rehearing *en banc*.

Star's arguments also are, for the most part, untimely. Star argued in its principal brief that the requirements for an injunction had not been met, and that the document preservation order was subject to the same standards as an injunction. Star's first two questions presented — the First Amendment prior restraint argument and the future communications argument — appeared in writing at the earliest in Star's Petition for Panel Rehearing. Only Star's third question presented — whether the court erred in granting an overly broad injunction and then reissuing it in modified form as a document preservation order without first meeting the requirements of an injunction — was even arguably properly and timely raised in the court of appeals. Furthermore, many of Star's complaints in its principal brief that could be put down to overbreadth challenges referred specifically to a preliminary injunction that has since been dissolved, not the more narrowly tailored document preservation order that remains in effect.

In sum, the decision of the court of appeals set no precedent and created no conflicts, and the only asserted error that was properly presented to the court of appeals consists of allegedly erroneous factual findings or the misapplication of a correctly stated rule of law. Applying the principles set out in Sup. Ct. R. 10, this case is simply not "certworthy."

## II.

## THERE IS NO ERROR IN THE FIFTH CIRCUIT'S APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

### A. Federal Courts Have The Authority To Enter Document Preservation Orders.

The district court has within its inherent powers those powers necessary to protect the efficient and orderly administration of justice. *Roadway Express v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463 (1980); *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). The preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598, 599 (D.N.J. 1997). Courts' equitable powers regarding destruction of documents are longstanding; the power of chancery in England extended to cases of spoliation of papers. *Gaines v. Chew*, 43 U.S. (Howe) 619, 629 (1844).[3] Moreover, Rule 34 of the Federal Rules of Civil Procedure vests in the district court discretion whether and within what limits and under what conditions the inspection of documents or things should be ordered. 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2215, p. 444 (2d 1994); *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969). If the district court can order a document produced, or sanction a party for failing to preserve it, the court obviously can also order the document preserved.

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3. In footnote 18 of its petition for certiorari, Texaco cites *Gaines*, 43 U.S. (Howe) at 629, as "explaining that at English common law the power of the chancery extended to drawing an adverse inference because of the spoliation of papers." *Gaines* says "The power of chancery in England extends to cases of spoliation of papers, but not to setting up a will of personalty." *Gaines* says nothing about that power consisting of or being limited to drawing an adverse inference.

Document preservation orders are not controversial. In fact, such orders are common in complex litigation. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. at 599 (stating that "the preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation"); *HBJ, Inc. v. American Home Products Corp.*, 1994 WL 31005 (N.D. Ill. February 1, 1994) (stating that document preservation orders are common in complex litigation); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 881-882 (N.D. Ill. 1990) (reducing attorneys fees by 75% for pretrial matters such as document preservation orders which are "entered routinely in complex federal litigation"); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 250 (D. Minn. 1989) (document preservation order consisted on one paragraph of management order); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 104 F.R.D. 119, 121 (C.D. Ca. 1985) (imposing sanction for violation of oral document preservation entered by master); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 750 (E.D.N.Y. 1980) (discussing document preservation order); *Manual for Complex Litigation*, § 21.442, p. 75 (3d ed. 1995) (recommending document preservation and retention orders); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L. J. 1085, 1094 n.14 (1987) ("Such orders are common, and their violation is a sufficient basis for imposition of discovery sanctions"). Neither Texaco nor Star has cited a single case, treatise, article, or book in which a court or commentator has so much as entertained the idea that federal courts lack the power to order a party to refrain from destroying evidence.[4] The

4. Texaco claims in footnote 12 that a "passionate proponent" of document preservation orders ridiculed arguments that the power to enter such orders can be distilled from the Federal Rules of Civil Procedure, and cites Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 Tex. L. Rev. 1185 (1983). Texaco's assertion might charitably be attributed to

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most Texaco or Star has been able to do is point to a mild controversy over whether such orders are essentially injunctive, and therefore subject to the requirements of Rule an injunction, or whether they are run-of-the-mill discovery orders.[5]

Nor is there any controversy over the court's power to, as the Petitioners put it, "criminalize" the destruction of evidence by making it punishable by contempt. Numerous federal appellate courts have held that a party can be sanctioned under the court's inherent powers for destroying documents *even in the absence of a document preservation order*. *E.g.*, *Shepperd v. American Broadcasting Co., Inc.*, 64 F.3d 1469 (D.C. Cir. 1995); *Schmidt v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); *Uniguard Sec. Ins. Co. v. Lakewood Eng'g & MFG Corp.*,

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a remarkably inept misreading if the error had not been pointed out in the briefing before the court of appeals. Professor Oesterle's criticisms were aimed at courts sanctioning parties under Rule 37 for destroying documents *in the absence of a document preservation order*. Professor Oesterle did not question a court's power to impose a document preservation order, and observed that, although document preservation orders do not address prefiling document destruction, they do "avoid the apparent deficiency in Rule 37 for most postfiling document destruction if litigants can convince the judge to enter an order promptly." *Id.* at 1225. Other commentators agree. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction Of Evidence*, 36 Emory L. J. at 1094 n.14.

5. A few district court cases have analyzed document preservation orders as injunctions. *See Pepsi-Cola Bottling Company of Olean v. Cargill, Inc.*, 1995 WL 783610 *3 (D. Minn., Oct. 20, 1995); *In re Potash Antitrust Litig.*, 1994 LEXIS 20836 (D. Minn. Dec. 5, 1994); *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966); *Cunningham v. Bower*, 1989 WL 35993 (D. Kan. 1989).

982 F.2d 363 (9th Cir. 1992); *see also Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990). The only controversy is over whether that power comes from the court's inherent powers or from Rule 37.[6]

Document preservation orders are especially appropriate in race discrimination cases. The *Manual for Complex Litigation* recommends that

> [b]efore the commencement of discovery — and perhaps before the initial conference — the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, and records that may be relevant to the litigation.

*Manual for Complex Litigation*, § 21.442, p. 75 (3d ed. 1995). In the context of civil rights litigation, where EEOC regulations require an employer faced with an allegation of discrimination to "preserve all records relevant to the charge or action until final resolution of the charge or action," 29 C.F.R. § 1602.14 (1996), the *Manual* points out that

> [t]he parties may disagree on which records are covered by this mandate, particularly with respect to computerized data that may be periodically erased as new information is electronically stored. A separate order of the court may be needed both to clarify what records must be preserved and to provide relief from unduly burdensome retention requirements.

*Manual for Complex Litigation*, § 33.53, p. 352-53 (3d ed. 1995).

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6. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994).

In addition to providing a sound basis for imposing appropriate sanctions for the destruction of evidence, document preservation orders are the only effective disincentive to a party's cavalierly allowing evidence to be "accidentally" or "inadvertently" destroyed. For instance, EEOC regulations forbid an employer from destroying any documents related to the claims of a charging party, 29 C.F.R. § 1602.14, but the EEOC's enforcement mechanism only takes effect if the employer knowingly destroys or knowingly fails to maintain records with the intent to defeat the purposes of Title VII, and then the EOS (not the plaintiff) can (not must) recommend (not require) that an "adverse inference" be drawn from the destruction of or failure to maintain evidence, *EEOC Compliance Manual*, § 632.3(b)(2)(ii). Nor does the case law on spoliation provide an adequate remedy. In the absence of a document preservation order or injunction, courts typically require that the document destruction be intentional or in bad faith. *E.g., Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) (bad faith required for a negative inference); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1413 (D. Mass.), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990) (intentional destruction required for adverse inference). A court order or injunction, on the other hand, imposes an affirmative duty on corporate management to ensure that documents are not "inadvertently" destroyed in the usual course of business. *See In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997).

**B. The Fifth Circuit's Decision Does Not Conflict With *De Beers*.**

Texaco claims that federal courts lack the power to enter "property freeze injunctions." The district court found and concluded that the requirements for a preliminary injunction were met, and Texaco does not challenge these findings and

conclusions. The issue is not whether document preservation orders are subject to the same rules as injunctions,[7] or whether the district court's findings and conclusions with respect to the propriety of injunctive relief were correct, or whether the preliminary injunction was too broad. The issue is whether under any circumstances a court can enjoin or prohibit a party from destroying evidence.

Texaco cites this Court's decision in *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), in support of its argument. In *De Beers*, this Court held that the district court could not use its equity power to freeze an antitrust defendant's assets to ensure the enforceability of a possible fine for contempt if the defendant disobeyed an injunction that the court might issue at the end of the case. In so doing, this Court observed that the assets had nothing to do with the claims being asserted in the case and that the freeze was not interim relief of a kind that might be awarded at the end of the case. *Id.* at 220. The district court injunction in *De Beers* concerned "a matter lying wholly outside the issues in the suit" and was thus inappropriate. *Id.*

The district court's authority to enter document preservation orders in appropriate cases has nothing to do with the issues addressed in *De Beers*. It is not a question of requiring a party to set aside property or post bond to pay a judgment that may or may not ultimately be entered. The court's power to compel the preservation of evidence is central to the court's ability to administer justice. The district court's power to preserve evidence is not "a matter lying wholly outside the issues in the suit," and Texaco can cite no case applying *De Beers* to a situation remotely like the case at bar.

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7. Of course, if Smith is correct that document preservation orders are not injunctions, this issue applies only to the propriety of the now dissolved preliminary injunction and not to the court's authority to enter the document preservation orders.

**C. Document Preservation Orders May Apply Prospectively.**

Star claims that requiring it to preserve documents such as e-mail violates the First Amendment as a prior restraint on speech. The argument is that Star employees will know that certain communications will be preserved and possibly reviewed by Star management and/or attorneys. The employees may not feel comfortable expressing themselves freely if they know that "Big Brother" (*i.e.*, Star) is looking over their shoulders. In other words, Star claims that it has a right to destroy documents relating to Smith's discrimination claims (which are the only documents required to be preserved) because otherwise Star employees might refrain from e-mailing dirty jokes. While such conduct may, as Star says, be entitled to the highest degree of constitutional protection, it has nothing to do with the document preservation orders. The document preservation order on its face is not a prior restraint on speech. The mere fact that the order may have an incidental effect on free speech does not invalidate it. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability).

EEOC regulations require Star to "preserve all records relevant to the charge or action until final resolution of the charge or action." 29 C.F.R. § 1602.14 (1996).[8] Star does not claim that the EEOC regulations are an unconstitutional prior restraint, or that the government lacks a sufficiently compelling interest to require the preservation of evidence. Star's complaint instead is aimed at speech in no way related to the district court's order.

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8. *The Manual for Complex Litigation* points out that an order such as the district court entered here actually helps a civil rights defendant by clarifying what records must be preserved and providing relief from unduly burdensome retention requirements. *Manual for Complex Litigation*, § 33.53, p. 352-53 (3d ed. 1995).

In other words, with respect to the speech at issue, the order is completely content-neutral, and any chilling would be purely incidental. In contrast, the cases cited by Star dealing with the "chilling effect" of government actions deal with situations in which First Amendment concerns were implicated because the *purpose* of the statute was related to the suppression of free expression; *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111-12 (D.C. Cir. 1978) (*en banc*) (stating that the strictest scrutiny is applied "where the purpose of a statute is related to the suppression of free expression of ideas or information" and that the legislative history of the statute in question indicated that the purpose of the statute was related to the suppression of speech); or where there was no rational basis for the regulation, *Pentco, Inc. v. Moody*, 474 F. Supp. 1001, 1005 (S.D. Ohio 1978) (no rational basis for requiring disclosure of identities of minor shareholders or limited partners not involved in day-to-day operations of massage parlors). The purpose of the order plainly has a rational basis and is not related to the suppression of free expression of ideas or information — it is related solely to the preservation of evidence for a pending lawsuit.

Moreover, Star's argument proves too much. Star cannot explain how it can comply with EEOC regulations requiring the preservation of documents related to a discrimination charge unless it knows what is in the documents. Presumably, finding out what is in the documents would entail Star management or attorneys reading them. But the possibility that Star managers or attorneys might have read documents is precisely the alleged defect with the document preservation orders. The only difference is that Star knows that it does not have to take EEOC regulations as seriously.

If an order requiring that a party refrain from destroying evidence is an unconstitutional prior restraint on free speech

merely because a person might be less likely to speak if his words became known, then all discovery in every lawsuit is also an unconstitutional prior restraint. Moreover, the alleged "chilling effect" comes not from government scrutiny of Star's documents, but from the possibility that Star might scrutinize its own documents. The problem, if any, is not with the document preservation order, it is with Star's corporate culture.

**D. The Fifth Circuit's Decision Is Correct.**

Petitioners have maintained that the document preservation orders are really injunctions, and that the court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1). Smith has maintained that the document preservation orders are non-injunctive discovery orders,[9] and that the court of appeals could exercise jurisdiction over those orders only by treating the appeals as applications for writ of mandamus. *See, e.g., Church of Scientology v. United States*, 113 S. Ct. 447, 452 n.11 (1992)

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9. If an affirmative definition of a § 1292(a)(1) "injunction" must be attempted, it would embrace orders that are directed to a party, enforceable by contempt, and designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a temporary fashion. No branch of this definition will suffice alone. Many orders directed to a party and enforceable by contempt obviously are not injunctions, such as orders commanding a response to discovery demands.

16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3922, p. 65-68 (2d 1996) (footnotes omitted). Because preservation of documents is not a part of the substantive relief sought in Plaintiffs' First Amended Complaint, the district court's document preservation order is not immediately appealable as an injunction within the meaning of § 1292(a)(1), but rather is a discovery order entered under the court's inherent authority to protect the orderly and efficient administration of justice.

("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order."); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669 (1981). It is clear that the court of appeals affirmed the district court's findings and conclusions on the preliminary injunction, which has since been dissolved. It is not clear whether the court of appeals also considered the document preservation orders to be injunctive and affirmed them as well, or considered them to be non-appealable discovery orders that did not meet the requirements for mandamus. Determining whether the preliminary injunction was proper does not, therefore, necessarily put to rest the controversy. Nevertheless, the district court correctly applied the law with respect to the preliminary injunction, and its findings are not clearly erroneous. To the extent the document preservation order can be considered injunctive, it is supported by the same findings and conclusions.

In deciding whether to grant the preliminary injunction, the district court applied the standards set out in *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683 (5th Cir. 1980):

> (1) the movant has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) the injunction would not be adverse to the public interest.

Star agrees that this is the correct legal standard, but claims in conclusory fashion that Smith failed to make the required showing. The district court's findings are set out in its opinion, and are supported by the record. *See Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Star's main objection appears to be its belief that there was no evidence that that there was a danger that any documents would be destroyed. This contention has to be taken with more than just a grain of salt. The only reason the court is reading this brief is that Star wants desperately to destroy many of the documents that had been covered by the district court's preliminary injunction and are now covered by the document preservation order. Star's complaints in its petition for certiorari focus on the requirement that it preserve electronically stored information, but both Star's and Texaco's computer experts testified that documents — e-mail messages in particular — would be destroyed wholesale in the absence of the injunction. For example, Texaco's expert testified that the retention period for e-mail backup tapes is eight weeks, after which the tapes are reused. (2 R. 143-44). Similarly, Star's expert complained that it was a constant fight to get personnel to delete their e-mail and voice messages, and said "we're constantly trying to scrub our files." (2 R. 154). Star's claim that there was no evidence that any documents were in danger of being destroyed is simply not true. As with all the disputed issues raised in the petitions, Star's position finds no support in the facts or in the law.

## CONCLUSION

For the reasons stated above, the Petitions should be denied.

Respectfully submitted,

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